Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KELLY BRINES, ET AL.,

Petitioners,

vs.

XTRA CORPORATION,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

11pp

QUESTIONS PRESENTED

1. Whether the district court erred in finding that Xtra's 1993 employee policy manual contained language giving Xtra's administrator discretion to determine eligibility for benefits and to construe provisions of the benefit plan so that an arbitrary and capricious standard of review would be utilized?

2. Whether the district court erred in finding that the term "reduction in force" (as used in Xtra's 1993 employee policy manual) did not mean "termination" and thus, did not apply to the plaintiffs' terminations, although the district court's finding was in direct contradiction to both parties' statements that the term "reduction in force" meant "multiple terminations"?

3. Whether the district court erred in finding that the term "reduction in force" (as used in Xtra's 1993 employee policy manual) was unambiguous so that extrinsic evidence would not be used to interpret its meaning?

4. Whether the Appellate Court erred in finding that Xtra did not have an ongoing obligation to pay severance benefits to plaintiffs for a "reduction in force" based solely upon the 1993 employee policy manual, which states that "the Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force", when the facts have shown that: (1) Xtra's officers admitted that an ongoing program existed and Xtra implemented a program of payments of severance benefits to employees in the past and for the one employee not hired by the outsourcing company, (2) Xtra admitted that it did not change its program before the plaintiffs were terminated and (3) Xtra distributed a written memorandum evidencing their severance benefit program?

5. Is Xtra required to pay severance benefits only when a "reduction in force" occurs, and, if so, did a "reduction in force" occur with Xtra's multiple terminations of plaintiffs so that severance benefits were owed to Brines and the certified class.

6. Did Xtra's unrevoked, ongoing severance benefit program or practice create obligations of payments to Brines and the certified class, if their program or practice did not contradict the terms of any written plan?

7. Was the Apollo memorandum a written benefit plan that would obligate Xtra to pay severance benefits or, alternatively, can it be used as extrinsic evidence to define an ambiguous term?

8. Did the district court err when it found that ERISA was applicable to Xtra's severance benefit program when it subsequently found that there were no obligations to pay severance benefits pursuant to ERISA, so that the state law claims could not be reinstated (would they still be preempted if ERISA was inapplicable)?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Boguslaw Balenda
Guillermo Barboza
Edward Borodzinski
Manuel Bravo
Phillip Briski
David Corral
Jozef Dudas
Jose Espinosa
Fanciszek Fitt
Boleslaw Giedrojc
Michael Godette
Michael Griffin
Alex Harris
Guillermo Jimenez
Kzaimierz Kochanek
Ronald Kragulski
Amido Lezcano
Jose Lopez
Jorge Mariscal
Robert Przybylo
Marty Purtell
Gilbert Quiroz
Stanislaw Pylko
Stanislaw Rocha
Ralph Sanek
Janusz Swierzewski
Stanley Szczechowicz
Krzysztof Tumiel
Humberto Unzueta
Wladyslaw Zolink
Paul Caron
Bill Carrie
Ted Collins
Debbie Dentzman
Shirley Flynn
Ron Semmerling
Betty Vasquez
Ronald Ellington
Timmie Hayes
Kelly Brines
Dennis Bridges
Gary Welch
Bryan Turley
Ron Orloski
Dan Graham
Joel Compton
Donald Barnhart
David Crowe
Richard Dew
Terry Vollintine, Sr.
Orville Gieseking
Daniel Sauerwein
Ivan Rogers
Jan Pawlica
Rich Cervantez

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit Court of Appeals affirmed summary judgment entered by the United States District Court for the Southern District of Illinois in favor of defendant/respondent Xtra Corporation and against plaintiffs/petitioners Kelly Brines, representative of the class of plaintiffs. The opinion is reproduced in the Petitioner's Appendix (A-27).

JURISDICTIONAL STATEMENT

The Court of Appeals for the Seventh Circuit entered its opinion and judgment on September 10, 2002, and thereafter denied a Motion for rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Brines and the certified class were employees of Defendant, Xtra Corporation, Inc. (hereinafter referred to as "Xtra"). Brines alleges that they were entitled to severance benefits because Xtra ended its employment relationship with them. Brines and the certified class are entitled to severance pay of 1.5 weeks for each year of service or faction thereof plus 1 week of pay for each $10,000 of salary or fraction thereof. These benefits were paid in many other situations as part of an ongoing program at Xtra, which had admittedly not been changed at the time of the terminations. This formula was also called a "standard" formula and was used in a 1998 memorandum that was distributed to the employees for a potential merger during that time period (the merger did not take place).

Brines' initial complaint contained four counts. Three of these counts were based upon state law claims (breach of contract, common law fraud and violation of the Illinois Consumer Fraud

Act). Brines alleged in Count IV that Xtra violated ERISA by refusing to pay those benefits. Xtra filed a Motion to Dismiss wherein it denied that it owed any obligation to pay severance benefits pursuant to ERISA. The court found that ERISA was applicable to the case and dismissed the state law claims based upon preemption. R.21;A-24-26,Transcript of 9/25/00 hearing,p.3. Brines requested leave to file First Amended Complaint to add a claim for violation of the Illinois Wage Payment and Collection Act, which the magistrate judge denied as moot on January 16, 2001. R.37. Brines filed a Motion for Reconsideration of the magistrate judge's Order, which the district court denied. R.43. Brines appeals the court's finding regarding ERISA applicability and dismissal of the state law claims based upon preemption. Brines further appeals his Motion for Reconsideration of the Magistrate Judge's Order regarding these same issues.

Both parties filed Motions for Summary Judgment on the ERISA action. The court denied Brines' motion and granted Xtra's motion. R.84. Judgment was entered in favor of Xtra. R.85. Brines appeals these final Orders that disposed of all remaining issues in the case.

I. Xtra's outsourcing agreement and termination of employees.

In 1999, Brines and the class of plaintiffs were employees of Xtra Corporation, Inc. (hereinafter referred to as "Xtra"). R.67,p.5. Xtra entered into a contract with Container Port Group, Inc. (hereinafter referred to as "Container Port") in 1999, wherein Xtra would no longer employ numerous Trailer Mechanics and other employees at Xtra's Fairmont City, Illinois facility and its Chicago, Illinois facility. R.63,64,Ex.A;R.67,p.5. Pursuant to the outsourcing contract, Container Port would interview Xtra's workforce and, if a worker was acceptable, Container Port would become their new employer for work being performed at Xtra's facilities. R.63,64, Ex.A; Ex.M,p.14; R.67,p.5. The Plaintiffs-Appellants in this action were included in the work force listed in Appendix E to the outsourcing contract between Xtra and Container Port. R.63,64, Ex.A.

As part of the contract between Xtra and Container Port, Xtra's work force was to be paid pursuant to the terms negotiated by Xtra (as contained in the outsourcing contract). R.63,64, Ex.A. The terms in the contract between Xtra and Container Port did not include any severance benefits. R.63,64, Ex.A.

Xtra ended its employment relationship with Plaintiffs-Appellants (a class of 54 workers) on 12/31/99. R.63,64,Exs.P,p.53;Q,p.16;R,pp.21-22; R.67,p.5. As of 1/1/00, Plaintiffs-Appellants worked for a new employer, Container Port. R.63,64, Exs. P,53; R,pp.21-22; R.67,pp.5-6. Brines and the class of plaintiffs were not given the option of continuing to work for Xtra if they did not desire to work for Container Port. R.67,p.5.

Only one person from the Fairmont City and Chicago facilities was not hired by Container Port. R.63,64,Exs.M,p.15-16; N,p.39; R.67,p.5. That person, Don Johnson, was paid severance benefits by Xtra using the same formula that plaintiffs claim should be used in the calculation of their benefits.[1] R.63,64,Exs.E;M,p.16. In Xtra's internal memorandum from Shawn Hughes, Vice President of Human Resources, to Tom Giaccetto, general counsel for Xtra, the calculation of severance benefits paid to Mr. Johnson was referred to as the "standard" severance benefit formula. R.63,64Exs.J;M,p.21,23;R.67,p.4. The term "standard" formula was also hand-written on an internal memorandum regarding severance benefits that would be paid to workers not offered a job with Container Port. R.63,64,Exs.K;M,p.23; R.67,p.4. Throughout the remainder of this Brief, the term "standard formula" will refer to severance benefits calculated by "1½ weeks pay for every year of service or fraction thereof and 1 week pay for every $10,000 in salary or fraction thereof".

Container Port only has a one-year contract with Xtra at its Fairmont City, Illinois plant and a two-year contract at its Chicago facility. R.63,64,Ex.A; R.67,p.5. Either party can cancel this contract with a 90-day notice. R.63,64, Ex.A;M,p.32. Xtra has had numerous contracts with subcontractors in the past that have ended within a short period of time. R.63,64,Ex.Q,p.39. Some members of the class do not expect the relationship between Xtra

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[1] Again, that formula is 1½ weeks pay for each year of service or fraction thereof and 1 week pay for each $10,000 in salary or fraction thereof.

and Container Port to continue. R.63,64,Exs.P,pp.54-56,S. In fact, Xtra sent a memorandum to its employees, dated July 31, 2001, announcing the purchase of Xtra by a company called "Berkshire Hathaway". R.63,64,Ex.V.

II. Written severance benefit plan documents that were distributed to Plaintiffs-Appellants.

Xtra distributed written benefit plan documents regarding severance pay: a 1992 Plan and a 1993 Plan. R.63,64,Exs.B,p.6,C,p.11;R.67,pp.1-3. Xtra drafted the plan documents. R.63,64,Ex.O,p.30. The 1992 severance benefit statement (R.63,64,Ex.C,p.11; R.67,p.2) provides:

Termination of Employment:

> The Company reserves the right to terminate their employment with or without cause as long two weeks notice or pay in lieu thereof is given. If you decide to terminate your employment with the company for any reason, you should give the company two weeks notice.

Reduction in Work Force:

> If the Company determines that there should be a reduction in the workforce for business reasons, the following separation policy shall be implemented.
>
> If an employee agrees to work through the date specified by the Company, an employee will receive severance pay of 1.5 weeks for each year of service or fraction thereof plus 1 week of pay for each $10,000 of salary or fraction thereof. A minimum of four weeks of severance will be paid to all employees who agree to work through the specified date. In addition, the Company will allow the employee to continue medical and dental coverage if the employee prepays his portion of the premium for a period of up to four months. At the end of that

> time, the employee will be offered continuation of coverage through COBRA. Unused vacation pay will be paid in full at the time of termination.

The 1993 severance benefit statement (R.63,64,Ex.B,p.6; R.67,p.3) provides:

Termination of Employment:

> The Company may terminate your employment with or without cause as long as two weeks' notice or pay in lieu thereof is given. If you decide to terminate your employment with the Company for any reason, you should give the Company two weeks' notice.

Reduction in Work Force:

> The Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force. In addressing issues related to layoffs, Xtra will review all situations and strive to take whatever action is necessary to ensure fairness in the treatment of employees. (Emphasis added)

According to the Vice President of Human Resources for Xtra Corporation, a "Reduction in force" meant multiple terminations. R.63,64,Ex.O,p.79.

In 1998, Xtra distributed a written memo to all Xtra Intermodal employees, including plaintiffs, wherein its severance benefit program was outlined. R.63,64 Ex.D; R.67,p.4. The memorandum announced a proposed merger with a company called "Apollo". R.63,64,Ex.D; R.67,p.4. Although the memorandum used the term "merger", the President of Xtra Intermodal testified that Apollo "was really buying the company". R.63,64,Ex.M,p.40. The memo states that any employees who had their jobs eliminated would be entitled to severance pay based upon the formula of 1.5 weeks pay for each year of service or a fraction thereof plus 1 week of pay for each $10,000 of salary or

fraction thereof. R.63,64,Ex.D; R.67,p.4. Jordan Ayers, President of Xtra Intermodal, agreed that this was a "past practice". R.63,64,Ex.M,pp.40-43;R.67,p.4. The Apollo memorandum further states: "Please note for purposes of this memorandum you shall not be considered terminated if you are offered a permanent comparable position with an affiliated company in your current location." R.63,64,Ex.D; R.67,p.4. Mr. Ayers described this provision by providing the following testimony: "[I]f I was retained as president or vice president in whatever the company was reformed as, and I was able to retain a comparable job with Apollo, the new owner of the company, I would receive no money." R.63,64,Ex.M,pp.40-41;R.67,p.4. Mr. Ayers further interpreted the memorandum language as follows: "[I]f I was offered a job in St. Louis, I may still have received severance because it wasn't a comparable job in my current location." R.63,64, Ex.M,p.41; R.67,pp.4-5.

III. Xtra had an ongoing program to pay severance benefits pursuant to a "standard" formula.

For each of Xtra's other plant closings, Xtra paid severance benefits pursuant to a "standard" formula. R.63,64,Ex.E,F,G,I, P,pp.72-73; R.67,pp.3-4. For example, Xtra paid severance benefits to employees at its Memphis, Tennessee plant in 1992-1993 (R.63,64,Ex.N,pp.57; R.67,p.3), Kansas City plant in 1998 (R.63,64,Exs.F;P,pp.72-73; R.67,p.3), and Atlanta office in 1996 (R.63,64,Ex.G; R.67,p.3), when those employees left the employment of Xtra.

In addition, when Xtra consolidated or centralized its administrative personnel into a single office in 1999, all the employees who had their jobs eliminated were paid severance benefits pursuant to the "standard" formula. R.63,64,Ex.I;R.67,pp.3-4. According to Mr. Ayers, workers in shared services who chose not to take the new position and move to St. Louis were given severance benefits pursuant to the "standard" formula. R.63,64Ex.M,p.43-45.

In addition, other workers had their jobs eliminated in the past at the Fairmont City facility and they were paid severance benefits pursuant to the "standard" formula. R.63,64,Ex.P,pp.29,68-73;R.67,p.4. These individuals include

Charles Seigert in 1987, Dave Busch in 1996-1997 and Brian Turley in the 1990s. R.63,64,Ex.M,p.29;R.67,p.4.

Severance benefits, pursuant to the standard formula, were also paid to employees who had their jobs eliminated in Fort Wayne, Indiana and Quad Cities, Illinois area in 1998. R.63,64,Ex.O,p.33. Severance benefits were also given to an employee who had her collection analyst job eliminated in 1997. R.63,64,Ex.O,p.35.

Finally, the President of Xtra Intermodal, Jordan Ayers, and the Vice President of Operations, Robert Marchert, admitted that Xtra had an ongoing program to pay severance benefits to any employee who had their job eliminated. R.63,64,Exs.M,p.25;N,p.54. When employees confronted these executives at a 12/99 meeting in Fairmont City, Mr. Ayers did not deny the existence of the severance program. R.63,64,Ex.P,p.49. Mr. Ayers admitted that prior to that meeting, the determination to not pay severance benefits was because the Container Port work was "comparable" to his understanding. R.63,64,Ex.M,pp.17-18. Mr. Ayers testified, "if it had sold without a comparable job then severance benefits would have been paid to the workers pursuant to the standard formula calculations." R.63,64,Ex.M,p.36. Mr. Ayers did not believe that the change to Container Port was a "reduction in labor" to Xtra. R.63,64 Ex.M,p.19.

In addition, the top executives at Xtra had been continually running a computer printout of the severance benefits owed to plaintiffs in 1999 that showed the severance benefits pursuant to the "standard" formula. R.63,64,Ex.M,pp.34-35,Ex.U. Jordan Ayers testified that Xtra had been attempting to sell the division in 1998 and 1999 to various companies and during the same time period had been generating computer printouts calculating severance pay (based on the standard formula) for its employees at the Fairmont City and Chicago facilities. R.63, 64,Ex.M,pp.34-35,Ex.U. Robert Marchert, V.P. of Operations, testified that as of 1999, the workload had been slipping for the last 8–10 years. R.63,64,Ex.N,p.44. The workers believed that there was "turmoil in 1998 and 1999 in the Xtra Division. R.63,64,Ex.R,p.33.

The computer printout lists the employees at the Fairmont City and Chicago plants. R.63,64,Ex.U. It also lists columns for severance pay at 1½ weeks of pay for each year of service or fraction thereof and 1 week of pay for each $10,000 of salary or

fraction thereof. R.63,64,Ex.U. The last column is the total severance pay based on this standard formula. R.63,64,Ex.U. The date of the printout is 11/23/99 (1 week before Xtra's announcement of the outsourcing agreement to plaintiffs). R.63,64,Ex.U. It was based on the excel software, programmed at Xtra to run this information for employees who needed severance pay calculated. R.63,64,Ex.O,pp.103-108.

The executives who decided not to pay plaintiffs any severance benefits were Jordan Ayers, President of Xtra Intermodal, and Jeff Blum, Vice President of Operations for Xtra Corporation, Inc. R.63,64,Ex.M,p.24. Mr. Ayers testified that the payment of severance benefits to the plaintiffs would directly affect his bonuses, which are based upon the division's financial performance. R.63,64,Ex.M, p.51. Mr. Blum's bonus plan was based on the entire corporation's profitability. R.63,64, Ex.M, p.51.

IV. Before Xtra's reduction in its labor force on 12/31/99, there were no changes made to Xtra's written plan(s) and no changes to the unwritten program or practice.

Jordan Ayers, President of Xtra Intermodal, testified that Xtra's program after December 31, 1999 (the date of the reduction in force) would be to pay severance benefits to workers who had their jobs eliminated. R.63,64,Ex.M,pp.25. Likewise, Robert Marchert, V.P. of Operations, testified that if there was to be another reduction in force (and no comparable job) the worker would be entitled to severance benefits. R.63,64,Ex.N,pp.65. In fact, Mr. Ayers and Mr. Marchert testified that they would expect severance benefits based upon the 1992 formula, at a minimum, if their jobs were eliminated. R.63, 64 Exs.M,pp.25; N, pp. 65.

In addition, Xtra paid severance benefits based upon the "standard" formula to one of the mechanics that was not hired by Container Port in the 1999 reduction in force. R.63,64,Exs.N,pp.39,53;E,M,p.21. As part of Xtra's contract with Container Port, Container Port interviewed the workers and had the right to not hire a worker. R.63,64,Ex.A. Container Port exercised this right with respect to Don Johnson. R.62,63, Exs.N,pp.39,53;E,M,p.21. Xtra paid Mr. Johnson severance benefits based upon the "standard" formula as a result of his job

elimination on 12/31/99 (the same date as the plaintiffs' last day of work at Xtra). R.63,64,Exs.N,p.39;M,p21.

Finally, Xtra's counsel admitted that Xtra did not revoke its program before December 1999 when the terminations took effect. A-13-16,pp.15-16,Transcript of 9/4/01 Hearing. The cover of the 1993 handbook stated that the terms could be changed at any time. R.63,64,Ex.B.

V. The jobs at Xtra and Container Port are not "Comparable".

Obviously, as with any comparison between different companies, plaintiffs had different supervisors and different company rules, policies and procedures. R.63,64,Exs.S; P,p.50; Ex.R,pp.24-27;Ex.L;R.67,p.6.

The employees are receiving different benefits at Container Port as compared to benefits received at Xtra.[2] R.63,64, Exs.L,P,pp.50-51,64-65;Q,pp.28,38-39;Ex.R,pp.28-29;S;R.67,pp.6-7. Their seniority for severance benefits was not carried over for calculation of benefits at Container Port. R.63,64,Exs.L;Q,p.37;S. The number of sick days has been cut in half. R.63,64,Exs.L;Q,p.28;S. The number of personal days was cut in half. R.63,64,Exs.L;Q,p.;R The disability pay has been drastically reduced. R.63,64,Exs.L;Q,p.28;S. The eligibility and calculation for long-term disability has been affected because seniority was not carried over on this benefit. R.63,64,Exs.L;Q,p.38;S. New health insurance carriers have been implemented. R.63,64,Exs.L;R,pp.28-29;S;R.67,p.6. The new carrier does not pay the medical bills in a timely matter, as did the previous health insurance carrier when the workers were with Xtra (Health insurance is worse). R.63,64,Exs.P,pp.51,64-65;Q,p.28;R,pp.28-29;S. There is no "eye coverage" as there was with Xtra. R.63,64,Ex.R,p.28. In addition, certain holidays were reduced from full days to half days (Christmas Eve, Good Friday, New Years Eve). R.63,64,Exs.L;S;R.67,p.6. They lost two holidays. R.63,64,Ex.Q,p.28. The employees no longer get to take off work on their birthday. R.63,64,Exs.L;S. The workers

[2] Jordan Ayers believed that the workers were hired at their same position, same salary, same benefits, comparable 401(K) plan and comparable insurance benefits. (R. 63, 64, Ex. M,p.20.)

are unsure if seniority was carried over with regard to lay-offs in the future. R.63,64,Exs.L;S. In addition, workers are not yet vested in their 401(k) plan at Container Port and the plan has changed, whereas at Xtra, they were vested because of years of service. R.63,64,Exs.P,p.51;S;R.67,pp.6-7. Kelly Brines, who worked for Xtra for 30 years, no longer contributes because he is not vested. R.63,64,Ex.P,p.51.

The work has also changed at Container Port. R.67,p.6. There were approximately 18 employees at the Fairmont City facility in December 1999 and as of August 2001 there were approximately 15 employees because they quit or were fired. R.63,64,Exs.R,pp.24-25;Q,pp.33. At Fairmont City, Xtra did very little work on containers (the steel box on top of the chassis). R.63,64,Exs.R,pp.26;Q,pp.29;R.67,p.6. Presently, the volume of work on containers has increased. R.63,64,Exs.R,pp.26-27;Q,pp.29;R.67,p.6. In addition, the workers cannot work on trailers unless they get permission. R.63,64,Exs.R,pp.26. In the Chicago facility, the workers are now working on equipment that they had not worked on before while employed with Xtra and there are new occupations. R.63,64,Ex.N.pp.35-36;R.67,p.6.

VI. Plaintiffs-Appellants believed that they would obtain severance benefits from Xtra upon elimination of their jobs.

All of plaintiffs-Appellants believed that they were entitled to severance benefits based upon the "standard" formula. Affidavit of Plaintiffs-Appellants; R.63,64,Exs.P,pp.13-18,23-26,28-29;Q,pp.18-20,37;R,pp. 19,35. The employees were aware that others had been paid severance benefits when their jobs were eliminated. R.63,64,Exs.R,pp.31;Q,pp.18-20,37;P,pp.13-18,23-26,28-29,38,68-73. In addition, plaintiffs-Appellant's supervisors at the Fairmont City plant stated on several occasions that the workers were entitled to severance pay pursuant to the "standard" formula. R.63,64,Exs.P,pp.16-18,23-26;Q,pp.43-46. On several different occasions, during periods of lay offs and when other opportunities were present, Plaintiffs-Appellants were told by Xtra supervisor Dennis Moran, that "if you quite, you'll lose your severance benefits." R.63,64,Ex.S. Kelly Brines had a conference with Dennis Moran and when they called headquarters and asked

what the calculation of his severance benefits would be he was told that the amount would be based on the standard formula of 1½ weeks pay for every year of service or fraction thereof and 1 week pay for every $10,000 salary or fraction thereof. R.63,64,Exs.P,pp.16-18,23-25;S. Likewise, Dave Sauerwein, the plaintiffs-Appellant's supervisor at the Xtra before 12/31/99 (and member of this class of plaintiffs-Appellants) told plaintiffs-Appellants at Fairmont City that they were entitled to severance benefits pursuant to the standard formula. R.63,64,Exs.P,pp.25;S. The foreman, Joel Compton, also believed that they were entitled to the benefits. R.63,64,Exs.P,pp.23-25;S.

REASONS FOR GRANTING THE WRIT

I. Several Circuits recognize that non-written employee benefit plans can become ERISA obligations on the part of the employers. Some circuits do not recognize non-written ERISA benefit plans. The ERISA statute requires the plan to be in writing. This court should decide whether non-written employee benefit plans are actionable under ERISA law.

II. The question of when a written document arises to the level of a written ERISA obligation remains unclear. In the present case, there was a vague written promise to provide severance benefits and a subsequent memorandum defining the terms of the severance benefits. The terms of the severance benefits can also be defined by numerous other pieces of evidence. This court should decided whether these documents are sufficient to be a written benefit plan under ERISA law.

III. The circuits that recognize non-written benefit plans as ERISA obligations have different standards for determining whether there is sufficient evidence to determine: 1) whether the plan arises to the level of an ERISA obligation, and 2) the terms and conditions of the plan. If non-written benefit plans can become ERISA obligations, then this court should declare the standard for construing whether an employer's ERISA

obligation arises. In addition, this court should declare the standard for substantiating the terms of the ERISA benefit plan.

ARGUMENT TO SUPPORT REASONS FOR GRANTING THE WRIT

I. XTRA'S SEVERANCE BENEFIT PLAN SHOULD BE ANALYZED USING A *DE NOVO* STANDARD OF REVIEW.

In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 103 L.Ed.2d 80, 109 S. Ct. 948 (1989), the U.S. Supreme Court held that a *de novo* standard of review is to be applied to actions challenging benefit denials under ERISA, if the benefit plan documents do not give the administrator discretionary authority to determine eligibility for benefits or construe the terms of the plan. See also *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991) (*de novo* standard applied to computation of benefits in absence of plan language giving plan trustees discretion concerning the computation of benefits). Thus, if a plan administrator reserves the right to interpret the plan documents, then the Court must defer to that interpretation unless the decision was arbitrary and capricious. *Id.* However, if the plan administrator does not reserve the right to interpret the plan documents, then the documents will be interpreted by the trier of fact. *Id.*

Xtra argued that it can determine, on a case-by case basis within its discretion, which employees can obtain severance benefits in its plan (interpreting the language in the plan for eligibility). In the same line of reasoning, Xtra argues that it can interpret the term "reduction in force" contained in the 1993 handbook, to make the determination that plaintiffs are not eligible for the standard severance benefits paid in every other situation where Xtra eliminated jobs.[3]

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[3] Likewise, the President of Xtra believes he had the right to interpret whether the Container Port jobs were "comparable". He believed that severance benefits would be paid to appellants if they did not have a "comparable" position. R.63,64,Ex.M,pp.17-18,36,49.

In *Herzberge v, Standard Insurance Company,* 205 F. 3d 327 (7th Cir. 2000), the Seventh Circuit Appellate Court drafted "safe harbor" language for inclusion in ERISA plans that would allow an employer's interpretation of its plan to be reviewed by an "arbitrary and capricious" standard rather than the *de novo* standard: "Benefits under this plan will be paid only if the plan administer decides in his discretion that the applicant is entitled to them" Id., at 330. This "safe harbor" language is not present in Xtra's benefit plan. R.63,64,Exs.B,C and D.

Although the "safe harbor" language is not mandatory, "its absence compel[s] the conclusion that the plan administrator has no discretion". *Id.* There is no language in Xtra's benefit plan that is even arguably close to the "safe harbor" language as specified by the Seventh Circuit's decision in *Herzberge*. R.63,64,Exs.B,C and D.

Thus, the trier of fact has authority to interpret the language in the plan documents (applying a *de novo* standard of review). In other words, this court will make the interpretation of the term "reduction in force" (or the terms "comparable" "permanent" position with an "affiliated" company, as used in the Apollo memorandum) while disregarding the employer's interpretation. The court should determine eligibility of the plan without deference to Xtra's interpretation. (Although, Brines should still be entitled to summary judgment even under Xtra's own interpretation of "reduction in force" if Xtra uses "comparable" and "permanent" positions with "affiliates" to describe when a "reduction in force" is applicable).

II. XTRA'S ARGUMENT THAT IT HAS NO OBLIGATION TO PAY SEVERANCE BENEFITS, BASED SOLELY ON THE LANGUAGE IN THE 1993 HANDBOOK, IS WITHOUT MERIT.

A. The 1993 written handbook obligates payment of benefits for a "reduction in force".

Xtra argued, and the district court found, that Xtra had no obligation to pay severance benefits to Plaintiffs. The basis for Xtra's assertion and lower court's decision is the reliance solely on the 1993 handbook language (without consideration of the 1998

Apollo memorandum or any other extrinsic evidence). The relevant portion of the benefit plan states:

> **Reduction in force**
> *The Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force.* In addressing issues related to layoffs, Xtra will review all situations and strive to take whatever action is necessary to ensure fairness in the treatment of employees. (Emphasis added) R.63,64,Ex.C,p.11.

Xtra's Brief in support of Motion for Summary Judgment cited to cases that held ERISA plans are discretionary plans. R.72,Section III.B. However, in those cases, the administrator reserved the right to interpret eligibility and terms under the plan and explicitly stated that they would decide benefits on a case-by case basis whether to award benefits. In the present case, Xtra did not reserve the right to decide eligibility or interpret terms within the plan. R.63,64,Ex.B,p.6. Furthermore, the plan does not state that the administrator will decide "on a case-by case basis" whether or not to give benefits. R.63,64,Ex.B,p.6. In fact, language in the 1993 handbook is completely inapposite of Xtra's assertion that it has no obligation to pay benefits. R.63,64,See Ex. B. The language clearly and unambiguously obligates Xtra to pay severance benefits for a "reduction in force".

B. Xtra implemented a severance benefit plan as of December 31, 1999.

The district court held that Xtra would only need to "develop and implement" a plan if "business and economic conditions necessitated a reduction in force". R.84,p.7. The district court, in essence, ruled as a matter of law for Xtra that this obligation was not triggered. This holding, however, fails to recognize that the severance benefit program was, in fact, developed and implemented on 12/31/99.

Jordan Ayres, President of Xtra Intermodal, testified that the determination to not pay severance benefits to plaintiffs was

because the Container Port work was "comparable" to him. R.63,64,Ex.M,pp.17-18. In addition, Mr. Ayers testified "if it had sold without a comparable job then severance benefits would have been paid to the workers pursuant to the standard formula calculations". R.63,64, Ex.M,p.36. Mr. Ayers did not believe that the change to Container Port was a "reduction in labor" to Xtra. R.63,64,Ex.M,p.19. When employees confronted the executives at a 12/99 meeting in Fairmont City, Mr. Ayers did not deny the existence of the severance program. R.63,64,Ex.P,p.49.

Robert Marchert, Vice President of Operations, was one of the executives that announced the reduction in force to plaintiffs at a meeting in Chicago and Fairmont City on 12/1/99. R.63,64,Ex.N,p.48. Mr. Marchert also did not deny the existence of the severance program. R.63,64,Ex.N,pp.49-52. Anyone who was not offered a job with Container Port would be paid severance benefits (Don Johnson was not offered a job and was paid severance benefits). R.63,64,Ex.N, p.53-54.

C. The payment of severance benefits on numerous prior occasions evidences an ongoing practice or program and because Xtra admitted that this program was not revoked, the same plan was implemented on December 31, 1999.

The severance benefit program utilizing the "standard formula" was implemented on numerous occasions after the 1993 handbook was distributed. This is evidence by severance payments during numerous plant closings, the distribution of the 1998 Apollo memorandum, use of the term "standard formula" in internal memorandums when referring to severance benefits and computer-generated calculations of the severance benefits for the class of plaintiffs before terminations.

The facts further show that the ongoing program was not revoked or changed before 12/31/99. During the hearing on Motions for Summary Judgment, Xtra's attorney stated that Xtra had the right to revoke its severance benefit program but Xtra did not do so before 12/31/99. A-13-16,pp.15-16,Transcript of 9/4/01 hearing.

Furthermore, the non-revocation of the severance benefit plan before 12/31/99 is evidenced by the payment of severance

benefits to Don Johnson (the one worker who was not hired by Container Port). R.63,64,Ex.M,p.15-16;Ex.N,p.39. Don Johnson was paid severance benefits by Xtra using the same formula that plaintiffs claim should be used in the calculation of their benefits. R.63,64,Ex.E;Ex.M,p.16. Thus, this is direct evidence of an existing severance benefit plan as of 12/31/99.

The facts clearly show the existence of the plan and as indicated by Xtra's officers, the benefits were not paid because the President's interpretation of the term "reduction in labor". In other words, the obligation existed and only the eligibility for the benefits is at issue.

III. THE TERM "REDUCTION IN FORCE" SHOULD BE INTERPRETED TO INCLUDE THE MASS JOB TERMINATIONS.

The district court held that severance benefits were not owed to Brines because there was no "reduction in force", as stated in the 1993 handbook. R.84,85. Likewise, the President of Xtra testified that the reason benefits were not paid to the workers who ere hired by Container Port was because he believed it was a "comparable" position and there was no "reduction in labor". R.63,64,Ex.M,pp.17-19,36.[4]

A. This Court should first analyze whether the term is ambiguous.

In construing benefit plans governed by ERISA, the Court should be guided by the Federal Common Law Rules of Contract Interpretation. *McNeilly v. Bankers United Life Assurance Co.*, 1999 F.2d 1199, 1201 (7th Cir. 1993). When plan terms are ambiguous, the terms are to be construed in favor of the employee/beneficiary. *Id.* citing to *Phillips v. Lincoln Nat. Life Insurance Co.*, 978 F.2d 302, 308, 312-314 (7th Cir. 1992) and *Hammond v. Fidelity and Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992). (In the present case, Xtra drafted the plan

[4] Xtra's president did not state that a severance benefit program was nonexistent. In other words, Xtra did not provide benefits because of its interpretation of its plan.

documents. R.63,64,Ex.O,p.30.) The terms in the plan documents are ambiguous if they are subject to more than one reasonable interpretation. *McNeilly*, 999 F.2d. at 1201, citing *Auto-Owners (Mut.) Ins. Co. v. L.P. Cavett Co.*, 882 F.2d 1111, 1113 (7th Cir. 1989) and 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.12a, at 280 (1990).

B. "Reduction in Force" means "termination" or "separation" of employment and is unambiguous.

In the present case, the 1993 severance plan statement provides: "The company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force." R.63,64,R.63,64,Ex.B. The second sentence following this language applies to "layoffs". R.63,64,Ex.B.

"Reduction in force" should be interpreted to mean an elimination of the employee's job or a "termination" of the job. See *Anstett v. Eagle – Picker Industries, Inc.*, 203 f. 3d 501 (7th cir. 2000) and cases cited therein. In fact, the plain meaning of the term "reduction" means decrease, cutback, removal, ending or elimination. The plain meaning of the term "[work]force" means labor force, employees, workers, personnel or staff. **When the Vice President of Human Resources for Xtra Corporation was questioned as to what this term meant, he responded by testifying that "reduction in force" meant multiple terminations.** R.63,64,Ex.O, p.79.

Therefore, the language is unambiguous and should be construed to provide severance benefits when employees have their jobs eliminated. The district court stated that Brines' attorney admitted "reduction in force" was unambiguous. Unfortunately, the district court held that this term meant the opposite of the meaning given it by Brines' attorney and by Xtra's Vice President of Human Resources, who was responsible for interpreting the plan.

C. The Seventh Circuit case *Anstett* and other cases directly support Brines' interpretation of the severance benefit plan.

Xtra's citations to various cases in its Motion for Summary Judgment differ from the present case because of different standards of review and differing benefit plan terms. In *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983) an "arbitrary and capricious standard" was applied and thus, the court gave deference to the administrator's interpretation of terms. See *Anstett v. Eagle – Picker Industries, Inc.*, 203 F.3d 501 (7th Cir. 2000) (distinguishing its holding to award severance benefits to employees with the holding in *Sly,* which denied severance benefits, on the basis of the standard of review). In addition, the case of *James v. G.M. Corp.*, 230 F.3d 315 (7th Cir. 2000) cited by Defendant was a case with different terms than in the present case and was likewise decided under the "arbitrary and capricious standard". Another case referenced by Defendant, *Allen v. Adage, Inc.*, 967 F.2d 695 (1st Cir. 1992) also involved different plan language. See cases referenced in *Allen*, which held opposite conclusions based on differing plans.

The case that appears to be on "all fours" with the present case is *Anstett v. Eagle-Picher Industries, Inc.*, 203 F.3d 501 (7th Cir. 2000). That case involved the *de novo* interpretation of the term "terminated", which was contained in the plan language. *Id.* The court held that employees were "terminated" and entitled to severance benefits. *Id.* The employer argued that the employees did not suffer any period of unemployment because the successive employer purchased assets of the former employer (it was merely a change in owners without any change in the employee's jobs).[5] *Id.* The court held that the employer could have easily made the provision of unemployment applicable as a provision in the plan. *Id.* Because it did not insert that language, the court would not imply this qualification, even though it was clear that the intention was for a period of unemployment to obtain benefits. *Id.* In the present case, Xtra could have specified terms of unemployment but did not make that a condition of the plan. In fact, there is not even a qualification for a "comparable" position.

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[5] The Container Port and Xtra contract was not a sale of assets or sale of the company. It was an outsourcing agreement that eliminated jobs with Xtra. There is no question that plaintiffs no longer work for Xtra even though Xtra is still a viable operation.

Likewise, in *Harris v Pullman Standard, Inc.*, 809 f.2d 1495 (11th Cir. 1987), the court awarded severance benefits to employees after the sale of the company, even though the employees remained in their positions with no period of unemployment. The court held that the term "company" did not include successive corporations. *Id.*, at 1498. In addition, the court noted that the severance benefit plan included one section concerning "layoffs" and one section concerning "severance benefits" and thus, a period of unemployment (transition payment) was not one of the purposes for the severance benefits. *Id.*, at 1499 Likewise, in the present case, Xtra's 1993 benefit plan includes two sections – one for a separation program and one for "layoffs". R.63,64,Ex.B. Therefore, the purpose of the severance benefits should be considered more of a reward for past performance rather than a transition payment. In fact, the intent of Xtra in providing a reward for past service rather than a payment for a transitory period can be shown by Xtra's determination of severance benefit payments to other workers who had their jobs eliminated, without any inquiry by Xtra as to whether the worker had secured another position. See R.63,64,Ex.N,p.59-63 (from severance benefit letters sent to workers without determining subsequent jobs); R.63,64,Ex.O,p.93-94;Ex.S. In addition, the large amount owed to Brines and the class of 54 plaintiffs (approximately $750,000) is indicative that this is more than just a transition payment. R.63,64,Ex.S.

The Harris Court also held that the employer acted arbitrarily because it violated procedural requirements of ERISA by failing to furnish copies of the benefits to the employees and failing to have any claim procedure. *Id.*, at 1499. In the present case, Xtra violated procedural requirements as well because there were no filings.

IV. THE 1998 APOLLO MEMORANDUM CAN BE CONSIDERED IN DEFINING THE ELIGIBILITY STANDARDS AS EITHER PART OF THE WRITTEN PLAN OR AS EXTRINSIC EVIDENCE USED TO DEFINE TERMS IN THE 1993 WRITTEN PLAN.

The 1998 "Apollo" memorandum that was distributed to Xtra's employees clearly delineates the ongoing severance benefit

package that was available to employees by stating the "standard" formula. R.63,64,Ex.D. This document could be considered part of the written severance plan because of its distribution to all Xtra Intermodal employees, including plaintiffs. Alternatively, if not considered part of the written plan (because only applicable to the Apollo merger), then the "Apollo" memorandum could be used as extrinsic evidence to determine what severance benefits were in effect as of 12/31/99 or to interpret what is meant by "reduction in force".

The "Apollo" memorandum states that the employees would be paid severance benefits pursuant to the standard formula. R.63,64,Ex.D. The language at the end of the memorandum states that no severance benefits would be paid if a worker takes a "permanent comparable position with an affiliated company" (emphasis added). R.63,64, Ex.D. The terms "permanent comparable position" with an "affiliated company" are clearly ambiguous. Thus, these terms should be construed against the employer (the party that drafted the document) and in favor of plaintiffs, pursuant to the above-cited law.

V. IF THE APPLICABLE TERMS ARE AMBIGUOUS, THEN EXTRINSIC EVIDENCE AND LAW CONSTRUING TERMS IN BENEFIT PLANS SHOW THAT BRINES IS ENTITLED TO SEVERANCE BENEFITS.

If the plan language is ambiguous, then the court may consider extrinsic evidence to resolve the ambiguity. *Anstett v. Eagle –Picker Industries, Inc.*, 203 F.3d 501, 503 (7th Cir. 2000).

The extrinsic evidence that can be utilized by the court to interpret ambiguities in the 1993 severance benefit statement includes the 1998 "Apollo" memorandum (although this could be considered part of the written plan). In addition, Xtra's ongoing practice to pay benefits to other employees who had their jobs eliminated could be used in interpretation of the terms. Other extrinsic evidence includes admissions by Xtra executives that they had developed an ongoing practice and procedure to pay a "standard" formula for severance benefits.

The extrinsic evidence that can be utilized to interpret ambiguities in the 1998 "Apollo" memorandum is extensive. The

language at the end of the memorandum states that no severance benefits would be paid if a worker takes a "permanent comparable position with an affiliated company". R.63,64,Ex.D. The terms "permanent comparable position" with an "affiliated company" are clearly ambiguous. Thus, these terms should be construed against the employer (the party that drafted the document) and in favor of plaintiffs-appellants, pursuant to the above-cited law.

First, the plaintiffs-Appellants are not in a "permanent" position by any means. The outsourcing agreement between Xtra and Container Port is only for 1 year at the Fairmount City plant and 2 years at the Chicago plant. R.63,64,Ex.A. Either party can cancel this contract with a 90-day notice. R.63,64, Ex.A;M,p.32. Employees who were deposed by Defendant testified that Xtra did not have a good past record maintaining long-term contractual relationships with other subcontractors. R.63,64,Ex.Q,pp.39;Ex.S. Jordan Ayers testified that they would be making a decision in October 2001 whether to renew their contract with Container Port. R.63,64,Ex.M,p.33. Furthermore, the timing of the outsourcing agreement appears to be an attempt to perform a "reduction in force" and not pay severance benefits to employees. Robert Marchert, V.P. of Operations, testified that as of 1999, the workload had been slipping for the last 8–10 years. R.63,64,Ex.N,p.44. The workers believed that there was "turmoil in 1998 and 1999 in the Xtra Division. R.63,64,Ex.R,p.33. Jordan Ayers testified that Xtra had been attempting to sell the division in 1998 and 1999 to various companies and during the same time period had been generating computer printouts calculating severance pay (based on the standard formula) for its employees at the Fairmont City and Chicago facilities. R.63,64,Ex.M,pp.34-35,Ex.U. This evidence could imply that Xtra (the owner of the property which is outsourced to Container Port) does not have an intention of keeping the outsourcing agreement but is merely attempting to thwart a substantial amount of severance payments for a large reduction in force.

In addition, the term "affiliated company" that is used in the "Apollo" memorandum should be interpreted to mean a purchasing company (like Apollo) or a division or subsidiary of the company. The terms were used to describe a pending purchase of the division (Xtra Intermodal) by Apollo. In fact, Mr. Ayres believed that a worker would have received the standard severance

benefits if they were hired by Apollo and moved from Kansas City to St. Louis. "Affiliated" should not be interpreted to mean each and every vendor or customer that might have ever had a contract with Xtra.[6] If that were the case, Xtra would need to search its databases at every termination.

In *Bedinghaus v Modern Graphic Arts*, 15 F.3d 1027 (11th Cir. 1994), the court determined that "staffers" were entitled to severance benefits after the Company's sale of assets. "Staffers" were interpreted to mean the company "and its affiliates, including wholly–owned subsidiaries." *Id.*, at 1029. The company "and it's affiliates" did not refer to the entity that purchased the assets of one of the Divisions. *Id.*, at 1030. In the present case, Container Port cannot be considered an affiliate, if the entity that purchased the assets cannot be considered an affiliate. Container Port did not purchase anything from Xtra and they did not merge. The *Bedinghaus* court further indicated that the benefits would not result in a windfall to Plaintiffs because one of the objectives of severance pay policies is to reward employees for past service to the company. *Id.*, citing *Bradford v GAF Corp.* 954 f. 2d 798, 801 (2d Cir. 1992).

Finally, the term "comparable" is very ambiguous. As stated previously, there were different supervisors, different benefits and different work at Container Port. Thus, the workers did not have a "comparable" position.

VI. EVEN IF THE WRITTEN PLAN WOULD NOT CREATE AN OBLIGATION TO PAY SEVERANCE BENEFITS, XTRA'S UNREVOKED, ONGOING PRACTICE OR PROGRAM FOR SEVERANCE BENEFITS CREATED A RIGHT TO BENEFITS.

It has been recognized that "[w]here one or more claimants succeed in demonstrating that the employer has a practice or program of paying severance benefits, the court will find the dispute to be governed by ERISA whether or not the employer's practice has been reduced to writing." *ERISA Practice & Litigation*, 1998, West Group, Section 12:41; p.403. *Sandstrom v. Cultor Food Science, Inc*,. 214 F.3d 795 (7th Cir. 2000) ("Several

[6] Again, the terms should be interpreted against the drafter of the document.

of our cases say that it is possible to have an unwritten pension or welfare-benefit plan under ERISA, if the plan is 'a 'reality,' which requires...that the court be able to determine 'whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.'"); citing *James v. National Business Systems, Inc.*, 924 F.2d 718, 720 (7th Cir. 1991), quoting from *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)and *Diak v. Dwyer, Costello & Know, P.C.*, 33 F.3d 809, 811-12 (7th Cir. 1994) and *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732, 738-39 (7th Cir. 1986). *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989); *Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987). See also, *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F. Supp. 459 (S.D. N.Y. 1988).

In *Diak v. Dwyer*, 33 F.3d 809, 811 (7th Cir. 1994), the court stated the following:

> A plan need not be in writing to be covered by ERISA so long as the plan is a reality, meaning something more than a mere decision to extend benefits. *James v. National Business Systems, Inc.*, 924 F.2d 718, 719 (7th Cir. 1991); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). Rather, we look to whether the decision "constituted an expressed intention by the employer to provide benefits on a regular and long-term basis." *Wickman v. Northwestern Nat'l Life Ins. Co.*, 908 F.2d 1077, 1083 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990).

The *Diak* court also cited *Donovan* with approval, stating:

> In *Donovan*, the Eleventh Circuit set out the prevailing test for determining whether a "plan" has been established within the meaning of ERISA: In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court

> must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing and procedures for receiving benefits. [citations omitted]. *Id.*, at 811-12.

It was Xtra's ongoing practice and procedure to pay severance benefits to employees who had their jobs eliminated (the severance benefit formula was called a "standard" formula in internal memorandums). For each of Xtra's plant closings, Xtra paid severance benefits pursuant to the "standard" formula.[7] R.63,64,Exs.E,F,G,I and P,pp.72-73. For example, Xtra paid severance benefits pursuant to the standard formula to employees at the Memphis, Tennessee plant in 1992-1993 (R.63,64,Ex.Npp.57), Kansas City plant in 1998 (R.63,64,Ex.F;P,pp.72-73), and Atlanta office in 1996 (R.63,64,Ex.G) when those jobs were eliminated. Severance benefits, pursuant to the standard formula, were also paid to employees who had their jobs eliminated in Fort Wayne, Indiana and Quad Cities, Illinois area in 1998. R.63,64,Ex.O,p.33. Severance benefits were also given to an employee who had her collection analyst job eliminated in 1997. R.63,64,Ex.O,p.35.

When Xtra consolidated or centralized its administrative personnel into a single office in 1999, all the employees who had their jobs eliminated were paid severance benefits pursuant to the "standard" formula. R.63,64,Ex.I. (The President of the company testified that these severance benefit statements were only applicable to the shared service workers. R.63,64,Ex.M,pp.43-45.) These statements were only distributed to workers in shared services. R.63,64,Ex.M,pp.43-45. According to Mr. Ayers, workers in shared services who chose not to take the new position and move to St. Louis were given severance benefits pursuant to the "standard" formula. R.63,64,Ex.M,p.43-45.

Other workers had their jobs eliminated in the past at the Fairmont City facility and they were paid severance benefits pursuant to the "standard" formula. R.63,64,Ex.P,pp.29,68-73.

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[7] "Standard" formula means 1 ½ weeks pay for every year of service or fraction thereof and 1 week pay for each $10,000 in salary.

These individuals include Charles Seigert in 1987, Dave Busch in 1996-1997 and Brian Turley in the 1990s. R.63,64,Ex.M,p.29.

Both the President of Xtra Intermodal, Jordan Ayers, and the Vice President of Operations, Robert Marchert, admitted that Xtra had an ongoing program to pay severance benefits to any employee who had their job eliminated. R.63,64,Ex.M,p.25 and Ex.N,p.54.

The term "standard" formula has been used by executives in the past to refer to severance benefits calculated by "1½ weeks pay for every year of service or fraction thereof and 1 week pay for every $10,000 in salary or fraction thereof". In Xtra's internal memorandum from Shawn Hughes, Vice President of Human Resources, to Tom Giaccetto, general counsel for Xtra, the calculation of severance benefits paid to Mr. Johnson was referred to as the "standard" severance benefit formula. R.63,64,Ex.J;Ex.M,p.21,23;Ex.O,pp.93-94. The term "standard" formula was also hand-written on an internal memorandum regarding severance benefits that would be paid to workers not offered a job with Container Port. R.63,64,Ex.K;Ex.M,p.23; Ex.O,pp.100-101. This standard formula was also a calculation that was part of Xtra's excel software, as evidenced by the computer printout showing plaintiffs' severance benefits on 11/23/99 (1 week before the announcement of the outsourcing agreement). R.63,64,Ex.O, pp.103-108.

Xtra's Brief argued that its non-payment of severance benefits to plaintiffs is consistent with its past practice. R.72,73,SectionG.I. This is not true, as shown by the abundance of severance benefit payments made in each case of job eliminations. There has never been a time when severance benefits were not paid when positions were permanently eliminated. R.63,64,Ex.O,p.72.

For example, a case on "all fours" with the present case is *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1355 (9th Cir. 1984). In *Blau*, the Court held that a benefit plan could exist within the meaning of ERISA despite its informal and unwritten form. The Court stated that: "It would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards."

Id., citing Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). Xtra's citations to *Sandstrom* and *McNab* in its Brief involve entirely different issues than in the present case. In those cases, the employer used different language in its written benefit documents and the plans were interpreted under the "arbitrary and capricious" standard of review. In the present case, there was express language evidencing entitlement to benefits for a "reduction in force", admissions by executives that the employees would fall within the gambit of the plan (but the executives interpreted the plan to make them ineligible), practice and procedure to evidence an interpretation of the terms and a written memo to employees that expressly stated entitlement to benefits. In addition, the admissions of Xtra's executives of the plan terms ("comparable" and "reduction in force") can be interpreted by the trier of fact under a *de novo* review. (Brines is not trying to alter any written explicit terms). Therefore, even if there were no 1993 plan stating that a plan will be developed and implemented, and even if there was no "Apollo" memorandum, and even if there were no admissions by the executors that a plan existed and even if there were no payments made to Don Johnson, the plaintiffs would be entitled to severance benefits because of Xtra's ongoing practice and procedure to pay benefits in the past, pursuant to Xtra's "standard" formula.

VII. IF XTRA DOES NOT HAVE A SEVERANCE BENEFIT PLAN OR OBLIGATION, THEN ERISA SHOULD BE INAPPLICABLE AND PREEMPTION OF THE STATE LAW CLAIMS SHOULD BE REVERSED.

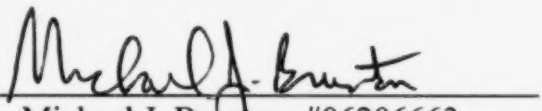
Xtra alleged, and the district court held, that the 1993 handbook contained unambiguous language that allow it discretion to pay severance benefits to employees. R.84. The district court stated that Xtra's written handbook "says nothing about what the separation program will be, who will benefit from it, or under what circumstances it will be administered". R.84,p.7. The district court did not consider extrinsic evidence. R.84,pp.6-7. Xtra's counsel agreed that whether or not ERISA applied to this situation was "an open question". A-24-26,pp.5-6,Transcript of 9/25/00 hearing.

Thus, if there was no obligation to provide benefits pursuant to the written plan and if there were no unwritten obligations, then ERISA should be inapplicable. Likewise, the basis for the dismissal of the state law claims, which was preemption (A-24-26,p.3,Transcript of 9/25/00 hearing), should no longer be applicable. Therefore, the district court's Order that dismissed the state law claims should be reversed. R.21. In addition, the district court's Orders denying Brines' request to file First Amended Complaint to add a state law count (alleging a violation of the Illinois Wage and Payment Act) should be reversed. The state law claims should be remanded to state court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

THE LAW OFFICE OF MICHAEL J. BRUNTON

By: 

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(618) 343-0750/ (618) 343-0227 Fax
Attorney for Plaintiffs/Petitioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MINUTES OF COURT

PRESIDER: HON. G. PATRICK MURPHY,
U.S. DISTRICT JUDGE

DATE:	SEPTEMBER 25, 2000
TIME:	8:35 AM – 9:00 AM
COURTROOM DEPUTY:	Linda M. Cook
COURT REPORTER:	Molly Clayton

KELLY BRINES, et al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

Counsel for Plaintiff(s): Michael Brunton
Counsel for Defendant(s): Allen Allred. Jeffrey Fink

Proceeding: MOTION TO DISMISS

Counsel for the parties appear. Arguments heard on the motion to dismiss, and the motion is **GRANTED as to Counts 1, 2, and 3, and DENIED as to Count 4.** The motion for leave to file first amended complaint (Doc. 9) filed by plaintiff is **MOOT**.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Before the Court is plaintiffs' Motion for Leave to File Plaintiffs' First Amended Complaint (Doc. 34), filed December 26, 2000.

On September 25, 2000, the Court granted defendant's motion to dismiss as to Counts 1, 2 and 3. Plaintiff's proposed amended complaint repeats these three counts, essentially verbatim. Because the Court has already dismissed these Counts, the Court will deny plaintiffs' Motion. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that plaintiffs' Motion for Leave to File Plaintiffs' First Amended Complaint (Doc. 34) be DENIED.

IT IS SO ORDERED.

Dated this 16th day of January, 2001.

GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL NO. 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

ORDER

MURPPHY, Chief District Judge:

Before the Court is Plaintiffs' motion for reconsideration of Magistrate Judge Order of January 16, 2001, and motion appealing Magistrate Judge Order of January 16, 2001 (Doc. 39) and Defendant's brief in opposition to the motion (Doc. 42).

Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend pleadings "shall be freely given when justice so requires." Here, having carefully considered Plaintiffs' motion to amend and Plaintiffs' motion for reconsideration of Magistrate Judge Cohn's Order denying leave to amend, the Court finds that justice does not require that Plaintiffs be allowed to amend their complaint. Moreover, Magistrate Judge Cohn's decision to deny the motion for leave to amend is not clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Southern District of Illinois Local Rule 73.1(a).

Accordingly, Plaintiffs' motion for reconsideration (Doc. 39) is **DENIED**, and Magistrate Judge Cohn's Order of January 16, 2001, is **AFFIRMED**.

IT IS SO ORDERED.

DATED this 8th day of February, 2001.

G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	
vs.	)	CIVIL NO. 00-495-GPM
XTRA CORPORATION,	)	
Defendant.	)	

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

This matter is before the Court on Plaintiffs' motion for summary judgment (Doc. 63) and Defendant's motion for summary judgment (Doc. 72). The Court heard argument on the motions on September 4, 2001. For the reasons set forth below, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

I. Background

Plaintiff, Kelly Brines, filed this action on behalf of a class of similarly situated individuals in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, on June 23, 2000 (*see* Doc. 2). The complaint asserts four claims against Defendant for breach of contract (Count I), violation of the Illinois Consumer Fraud Act (Count II), fraud (Count III), and violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (Count IV). Defendant removed the action to this Court on June 23, 2000, on the basis that Plaintiffs' claim for violation of ERISA gives this Court federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Defendant asserted in its notice of removal that all claims in Counts I, II,

and III are completely preempted by ERISA or alternatively, that the Court could exercise its supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Defendant contemporaneously filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing that all counts failed to state a claim and again asserting that the state law claims should be dismissed on the basis that they are preempted by ERISA. The Court held a hearing on the motions to dismiss on September 25, 2000, and granted Defendant's motion as to Counts I, 11, and 111, but denied the motion as to Count N. The Court found that Counts 1, 11, and III were preempted by ERISA, but that Count IV stated a claim in light of the Seventh Circuit's recent decision *in Anstett v. Eagle-Picher Indus., Inc.*, 203 F.3d *501(7'x: Cir. 2000). (See* transcript of September 25, 2000, hearing for specifics).

Brines then moved for class certification and, over Defendant's objection, the Court certified a class pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) defined as:

> Those persons who worked for XTRA Corporation, Inc., and listed in Exhibit "A" attached and incorporated herein, who had their employment relationship ended at XTRA Corporation, Inc.'s request and who were not paid severance pay in accordance with the terms of their employment contract.

(See Doc. 31).

The Court also appointed Kelly Brines as class representative and Michael J. Brunton as Class Counsel. The class definition was subsequently amended as follows:

> The persons identified in Exhibit A to this Order who worked for XTRA Corporation and/or XTRA Intermodal, Inc. (collectively "XTRA"), had their employment relationship terminated by XTRA on December 31, 1999, and were not paid severance by XTRA.

(See Doc. 46).

In short, Brines and the class he represents claim that they were

entitled to severance benefits at the time their employment relationship with XTRA Corporation ended. It is undisputed that the members of the class ended their employment with XTRA because XTRA entered into an outsourcing agreement with Container Port. It is likewise undisputed that Plaintiffs had no gap in their employment. In other words, on December 31, 1999, Brines and each member of the class worked for XTRA Corporation, and, on January 1, 2000, Plaintiffs stated to work for Container Port. Plaintiffs claim that they are entitled to severance benefits because the benefits handbook provides that benefits will be paid pursuant to a certain formula upon termination of employment with XTRA Corporation.

The 1993 employee manual contains a provision for termination of employment as follows:

> **TERMINATION OF EMPLOYMENT**
>
> The Company may terminate your employment with or without cause as long as two weeks' notice or pay in lieu thereof is given. If you decide to terminate your employment with the Company for any reason, you should give the Company two weeks' notice.
>
> Reduction in Workforce
>
> The Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force. In addressing issues related to layoffs, XTRA will review all situations and strive to take whatever action is necessary to ensure fairness in the treatment of employees.

See Exhibit B to Plaintiffs' motion for summary judgment (Doc. 63 at p. 6). The preceding manual, referred to as the 1992 manual, has a similar provision:

> **TERMINATION OF EMPLOYMENT**
>
> The Company reserves the right to terminate your employment with or without cause as long as two weeks' notice or pay in lieu thereof is given. If you decide to terminate your employment with the Company for any reason, you should give the Company two weeks'

notice.

Reduction in Workforce

If the Company determines that there should be a reduction in the workforce for business reasons, the following separation policy shall be implemented.

If an employee agrees to work through the date specified by the Company, an employee will receive severance pay of 1.5 weeks for each year of service or fraction thereof plus 1 week of pay for each $10,000 of salary or fraction thereof. A minimum of four weeks severance will be paid to all employees who agree to work through the specified date. In addition, the Company will allow the employee to continue medical and dental coverage if the employee prepays his portion of the premium for a period of up to four months. At the end of that time, the employee will be offered continuation of coverage through COBRA. Unused vacation pay will be paid in full at the time of termination.

See Exhibit C to Plaintiffs' motion for summary judgment (Doc. 63 at p. 11).

Plaintiffs argue that the benefit plan handbook does not give the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan and, therefore, the Court should review the plan using a *de novo* standard of review. *See Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101(1989).* Plaintiffs also argue that the Court should consider extrinsic evidence to determine whether they are entitled to benefits, including a written memo issued in *1998* concerning a proposed merger with a company called Apollo. According to Plaintiffs, XTRA had an ongoing program to pay severance benefits pursuant to a standard formula, and, therefore, XTRA owes benefits pursuant to that formula to Plaintiffs in this action.

Defendant argues that it is entitled to summary judgment because Plaintiffs have no right to severance benefits under the 1993 employee policies manual because it does not create a binding obligation

to pay severance benefits to anyone but, instead, gives XTRA the unrestricted right to determine severance benefits on a case-by-case basis. Alternatively, Defendant argues that Plaintiffs are not entitled to severance benefits because the 1993 handbook at most requires XTRA to pay severance benefits only when a "reduction in force" occurs, and no "reduction in force" occurred in this case.

II. Analysis

Under the well-settled. standard, summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ. P. 56(c); *Cox v. Acme Health Servs., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the nonmovant, a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant bears the burden of establishing that there exists no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant meets this burden, the nonmovant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed.R.Civ. P. 56(e); *Celotex*, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment against the party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and in which that party will bear the burden of proof at trial." *Celotax*, 477 U.S. at 322. As the Supreme Court stated in *Anderson*, "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 250. Weighing evidence, determining credibility, and drawing reasonable inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Anderson*, 477 U.S. at 255.

Summary judgment is an appropriate means to resolve claims for severance benefits. *See James v. General Motors Corp.*, 230 F.3d 315 (7th Cir. 2000); *Hickey v. A.E Staley Mfg., 995* F.2d *1385 (7th* Cir. 1993). "It has been uniformly held that general principles of contract law - under the federal common law that guides interpretation of ERISA plans - are to be applied to the interpretation of the language of such severance agreements." *Bock v. Computer Assocs. Int'l, Inc.*, 257 F.3d

700, 704 (7th Cir. 2001). And, "[w]hen there are no genuine issues of material fact, contract interpretation is particularly well-suited for summary judgment." *Anstett, 203* F.3d at 503.

As an initial matter, the Court finds that the 1993 plan is the ERISA employee welfare plan at issue. The first page of the 1993 policies manual states that "XTRA reserves the right to change policies and benefits at any tine with or without notice to the employee in order to better address the needs of the Company and its employees." *(See* Exhibit B to Doc. 63). The 1993 manual is in many respects similar to the 1992 manual, but it differs in certain respects. Thus, it only makes sense that the later manual superseded the 1992 plan, and for this reason, its provisions control. *See Kreutzer v. A. 0. Smith Cop.,* 951 F.2d 739 (7th Cir. 1991).

The next question is whether the plan gives XTRA the authority to determine eligibility for benefits and to construe provisions of the plan. If it does, XTRA's interpretation can be reversed only if it was arbitrary and capricious. *Bruch,* 489 U.S. at 115; *Allison v. Dugan,* 951 F.2d 828, 832 (7th Cir. 1992). The Seventh Circuit has noted that "[i]n some cases the nature of the benefits or the conditions upon it will make reasonably clear that the plan administrator is to exercise discretion. In others the plan will contain language that, while not so clear as our 'safe harbor' proposal, indicates with the requisite if minimum clarity that a discretionary determination is envisaged." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000).

Unfortunately, the plan does not contain Judge Posner's safe harbor language. But of course, this plan was drafted seven years before Judge Posner offered employers that language. The Court finds that the language envisions discretion with respect to when the company will develop a separation program. Ultimately, however, the Court finds that the same result is reached if the Court reviews XTRA's decision to not pay benefits under a *de novo* standard, and so it proceeds with the more stringent standard of review.

The first step in interpreting the benefit plan is to determine whether the contract is ambiguous or unambiguous as a matter of law. *See Hickey,* 995 F.2d at 1389. If the Court determines that the contract is unambiguous, the court must interpret the contract without reference to extrinsic evidence. *Id; see also Bock*, 257 F.3d at 705-706. In this case, Class Counsel conceded at the hearing that the term "reduction in force"

in the policies manual is not ambiguous. The Court agrees that the term is not ambiguous, and, therefore, the Court will not consider extrinsic evidence as to its meaning.

First, the Court finds that there was not a reduction in force at XTRA Corporation on December 31, 1999. The event was not a reduction in force; instead, a division of the company was sold to another company. Moreover, most convincing to the Court is the fact that the manual indicates that in the event of a reduction in workforce, "the Company ***will develop and implement*** an appropriate separation program if business and economic conditions necessitate a reduction in force." (emphasis added). Even if Plaintiffs could show that the change in Plaintiffs' employment from XTRA to Container Port constituted a reduction in force, the manual clearly indicates that the company will develop and implement an appropriate separation program when that occurs. The manual says nothing about what the separation program will be, who will benefit from it, or under what circumstances it will be administered.

Moreover, Plaintiffs want the Court to simply ignore language in the plan that the appropriate separation program will be implemented "if business and economic conditions necessitate a reduction in force." There is no evidence before the Court that Plaintiffs' termination of employment was necessitated by "business and economic conditions." Thus, Plaintiffs are not entitled to severance benefits.

Although the Court found *Anstett* to support the ERISA claim at the pleading stage, it notes that *Anstett* is factually distinguishable. In *Anstett,* the relevant language states that "[s]alaried employees *terminated* other than for cause or voluntary separation, due to the exigencies of the business situation, will be entitled to [separation] -benefits." 203 F.3d at 503 (emphasis added). In that case, the defendant did not consider the employees terminated because they were immediately hired by another company. Yet the Seventh Circuit noted that the employees had, in fact, been terminated from their employment with Eagle-Picher, and Eagle-Picher treated them as terminated "for every purpose other than the determination of eligibility for separation benefits." *Id.* at 504.

In the instant case, the language does not refer to termination. The plan only refers to a reduction in force, and there is no evidence that a. reduction in force occurred. No reduction in force occurs when an employer transfers its operations to another entity but immediately hires

the former employees on comparable terms and the former employees are never unemployed as a result of the transfer. *See Allen v. Adage, Inc.*, 967 F.2d 695, 701-703 (1st Cir. 1992). Instead, "typically, reductions in force are permanent layoffs undertaken for budgetary or economic reasons." *Id.* at 702. Again, the undisputed evidence establishes that there was not a reduction in force, and Defendant is entitled to judgment as a matter of law.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment (Doc. 63) is **DENIED**, and Defendant's motion for summary judgment (Doc. 72) is **GRANTED**. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant and against Plaintiffs on all claims, and this action is **DISMISSED with prejudice**. Class Counsel **SHALL SEND NOTICE** to each class member of this dismissal within 30 days of the date of this Order. The parties shall bear their own costs.

IT IS SO ORDERED.

DATED this 9" day of October, 2001.

G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	
vs.	)	CIVIL NO. 00-495-GPM
XTRA CORPORATION,	)	
Defendant.	)	

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came before the Court on Defendant's motion for summary judgment. *Doc. 72.*

IT IS ORDERED AND ADJUDGED that pursuant to the Court's October 9, 2001, Order, Judgment is entered in favor of Defendant and against Plaintiffs on all claims.

IT IS FURTHER ORDERED AND ADJUDGED that this action is **DISMISSED with prejudice**, and the parties shall bear their own costs and attorney's fees.

DATED: October 9, 2001

NORBERT G. JAWORSKI, CLERK

By:_____
Deputy Clerk

APPROVED:_____
G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

ALL PENDING MOTIONS

BE IT REMEMBERED AND CERTIFIED that heretofore on ***9/4/01***, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, ***HONORABLE G. PATRICK MURPHY***, United States District Judge presiding, the following proceedings were recorded by mechanical stenography, transcript produced by computer.

APPEARANCES:

FOR PLAINTIFF: Attorney at Law, **Michael Brunton**, 100 East Clay Street, Suite 201, Collinsville, Illinois 62234

FOR DEFENDANT: THOMPSON COBURN, **BY: Allen Allred**, 525 West Main St., P.O. Box 750, Belleville, Illinois 62220-0750 and THOMPSON COBURN, **BY: Jeffrey Fink**, One Firstar Plaza, Suite 3500, St. Louis, Missouri 63101-9702

REPORTED BY: ***Molly N. Clayton***, **RPR**, Official Court Reporter for United States District Court, Southern District of Illinois, 750 Missouri Ave., East St. Louis, Illinois 62201, (618) 482-9226

The *Herzberger* case did have some safe harbor language but it said that safe harbor language isn't mandatory and if it appears from the language of the plan that a discretionary determination is envisioned then you can still have discretion and an arbitrary and capricious standard of review is. And I believe that's what this language will do.

THE COURT: Surely there is more than one way to say the same thing. And I think Judge Posner was saying you can tell you how you can do this and you won't have any problems. Now if you want to be artistic about it and see if you can say it better you go right ahead. But if you just want to be safe, do it this way. But also understand under the law isn't there a difference in the way we look at pension plans, for instance, and termination plans? It seems to me under the case law the courts have looked at those differently. One being vested and perhaps the other not.

MR. FINK: And the Seventh Circuit has made clear that severance provisions are not vested benefits and they can be changed or revoked at any time. XTRA could have revoked this in December of '99 right before the plaintiff's employment ended. It didn't, but it could have. And the Seventh Circuit said it is not-

THE COURT: And now it wishes it had.

MR. FINK: I don't know if it did because XTRA has continued its business in this '93 handbook you weren't going

to revoke it and leave nothing out there.

THE COURT: Okay. So continue with your argument. I don't mean to take over your argument but I'm trying to follow both sides' positions here.

MR. FINK: Okay. Well, I think our argument is that the 1993 handbook is it. It is the ERISA plan. The Seventh Circuit has made clear that you can't look at extrinsic evidence. You can't look at the '98 Apollo memorandum that on its face only said it never came to fruition.

THE COURT: Have you guys read *Boch* by Judge Cudahy?

MR. FINK: No, I haven't, your Honor.

THE COURT: Decided February 18th.

MRS. ROSENSTENGEL: It was argued. It was decided July 18th.

THE COURT: Yeah. Well, I've read it. I guess that's all that matters. But for ERISA practitioners this is a very important case because it's concerned with the technical problems of interpreting these plans. And I'll just read a head note for you and you'll all see what I'm talking about here. "Under doctrine of extrinsic ambiguity, severance agreement summary provided by employer to employees could be considered in interpreting severance agreement, governed by ERISA, which based software salesman's severance pay on, quote, incentive compensation," notwithstanding that agreement was not intrinsically ambiguous, where summary mentioned bonuses but

are saying, Judge, we're entitled to summary judgment. We're entitled to summary judgment there's in dispute as to any material fact. So I am going to decide this case under Rule 56 and I do that less often than probably any judge in the district because I generally prefer to have a complete record on the matter. But this case is a little different.

First, it is an ERISA case; and secondly, both parties have provided me with voluminous documentation. And for the life of me I can't see what testimony would help. I don't know what kind of witness we could bring in that would help me resolve this case. So it will be decided on summary judgment. There being nothing further before the court, the court stands in recess. This matter is taken under advisement. A written order will follow in a relatively short day. Thank you.

****

REPORTER'S CERTIFICATE

I, Molly N. Clayton, RPR, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported in shorthand the proceedings contained in the foregoing 33 pages; and that the same is a full, true, correct and complete transcript from the record of proceedings in the above-entitled matter.

DATED this ***27th day of November***, 2001.

Molly Clayton, RPR

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

JOINT STATEMENT OF UNCONTESTED FACTS

Pursuant to Local Rule 7.1(h), Plaintiffs and Defendant submit the following Statement of Uncontested Facts. The exhibits referred to herein have been submitted by the parties with their respective summary judgment motion packages.

I. The Parties

1. Defendant XTRA Corporation is engaged in transportation equipment leasing services and repair services.

2. Plaintiffs are fifty-five former employees of XTRA Intermodal, Inc., a subsidiary of XTRA Corporation, at XTRA Intermodal's transportation equipment repair and maintenance facilities in Fairmont City and Chicago, Illinois. (For simplicity, XTRA Corporation and XTRA Intermodal, Inc., are hereinafter referred to collectively as "XTRA.")

II. The 1992 Handbook

3. In 1992, XTRA issued an Employee Policies Manual (the" 1992 Handbook") to its employees. XTR.A Exhibit G and Plaintiffs' Exhibit B are copies of the 1992 Handbook.

4. Plaintiffs received a copy of the 1992 Handbook.

5. The 1992 Handbook contained guidelines, policies, procedures, and employee benefits.

6. The cover page for the 1992 Handbook states: "This policy booklet is intended as a guideline only and. is not intended to form a contract between the Company and its employees, Management reserves the right to change or discontinue these policies at anytime without notification"

7. The 1992 Handbook states the following on page 11:

TERMINATION OF EMPLOYMENT

The Company reserves the right to terminate your employment with or without cause as long as two weeks' notice or pay in lieu thereof is given. If you decide to terminate your employment with the Company for any reason, you should give the Company two weeks' notice.

Reduction in Workforce

If the Company determines that there should be a reduction in the workforce for business reasons, the following separation policy shall be implemented.

If an employee agrees to work through the date specified by the Company, an employee will receive severance pay of 1.5 weeks for each year of service or fraction thereof plus 1 week of pay for each 510,000 of salary or fraction thereof. A minimum of four weeks of severance will be- paid to ail employees who agree to work through the specified date. In addition, the Company will allow the employee to continue medical and dental coverage if the employee prepays his portion of the premium for a period of up to four months. At the end of that time, the employee will be offered continuation of coverage through COBRA. Unused vacation pay will be paid in full at the time of termination.

III. The 1993 Handbook

8. In 1993, XTRA issued a new Employee Policies Manual (the "1993 Handbook") to its employees. XTRA Exhibit H and Plaintiffs' Exhibit C are copies of the 1993Handbook.

9. Plaintiffs received a copy of the 1993 Handbook.

10. The 1993 Handbook contained guidelines, policies, procedures, and employee benefits.

11. The cover page for the 1993 Handbook states: "The guidelines, policies, procedures and benefits described in this Employee Policies Manual should not be construed to create a contract of employment. XTRA reserves the right to change policies and benefits at any time with or without notice to the employee in order to better address the needs of the Company and its employees."

12. The 1993 Handbook states the following on page 6:

> **TERMINATION OF EMPLOYMENT**
>
> The Company may terminate your employment with or without cause as long as two weeks' notice or pay in lieu thereof is given. If you decide to terminate your employment with the Company for any reason, you should give the Company two weeks' notice.
>
> Reduction in Workforce
>
> The Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force. In addressing issues related to layoff's, XTRA will review all situations and strive to take whatever action is necessary to ensure fairness in the treatment of employees.

IV. XTRA's Past Payments of Severance Benefits

13. XTRA paid severance benefits to employees at the Memphis, Tennessee, plant in 1992-93, the Kansas City plant in 1998, and the Atlanta office in 1996 when their jobs were eliminated.

14. XTRA consolidated or centralized its administrative personnel into a single office ("Shared Services") in St Louis in 1999. All the employees who had their jobs eliminated were paid severance benefits pursuant to the formula of one and a half weeks (1½) pay for every year of service or fraction thereof and one (1) week pay for every ten

thousand dollars ($10,000.00) of salary ox fraction thereof. Employees who decided not to move to St. Louis to continue working for XTRA were given severance benefits pursuant to the formula.

15. Other workers had their jobs eliminated in the past at the Fairmont City facility and were paid severance benefits pursuant to the formula of one and a half weeks (1½) pay for every year of service or fraction thereof and one (1) week pay for every ten thousand dollars ($10,000.00) of salary or fraction thereof. These individuals include Charles Seigert in 1987, Dave Bush in 1996-97, and Brian Turley in the 1990s.

16. The formula of one and a half weeks (1½) pay for every year of service or fraction thereof and one (1) week pay for every ten thousand dollars ($10,000.00) of salary or fraction thereof has been referred to as the "standard" formula in XTRA internal memoranda marked as Plaintiff's' Exhibits J and K,

V. The 1998 Merger Talks Between XTRA and Apollo

17. In 1998, XTRA and Apollo Management and Interpool, Inc. ("Apollo") discussed a potential merger of XTRA into Apollo.

18. On July 14,1998, Lewis Rubin, XTRA Corporation's President, sent a memorandum to all XTRA employees, including Plaintiffs. XTRA Exhibit I and Plaintiffs' Exhibit D are copies of the 1998 Apollo Memorandum.

19. Jordan Ayers testified that the severance arrangement described in the 1998 Apollo Memorandum was consistent with XTRA's past procedure in paying severance benefits. Jordan Avers described the severance arrangement in the 1998 Apollo Memorandum as follows: "If I was retained as president or vice president in whatever the company was reformed as, and I was able to retain a comparable job with Apollo, the new owner of the company, I would receive no money." Mr. Ayers further interpreted the severance language in the 1998 Apollo Memorandum as follows: "If I was offered a job in St. Louis, I may still receive severance because it wasn't a comparable job in my current location."

20. Ultimately, the proposed merger between XTRA and Apollo did not go forward.

VI. The ContainerPort Agreement

21. On December 1, 1999, XTRA entered into a contract with ContainerPort Group, Inc, ("ContainerPort") providing for the outsourcing of XTRA Intermodal's Transportation equipment repair and maintenance facilities in Fairmont City and Chicago. XTRA Exhibit J and. Plaintiffs' Exhibit A are copies of the ContainerPort Agreement.

VII. ContainerPort's Hiring of Plaintiffs

22. ContainerPort conducted brief (5-10 minute) employment interviews of Plaintiffs.

23. ContainerPort hired 59 of the 60 employees at the Fairmont City and Chicago facilities, including all 55 Plaintiffs. XTRA paid severance to the one employee (Dan Johnson) whom ContainerPort did not hire.

VIII. The End of Plaintiff s Employment with XTRA

24. On December 31, 1999, Plaintiffs' employment with XTRA ended.

25. XTRA paid Plaintiffs a two-week bonus at the end of December 1999.

26. XTRA did not pay severance to Plaintiffs.

27. Plaintiffs weave not given the option of continuing to work for XTRA if they did not desire to work for ContainerPort.

IX. Plaintiff's Employment with ContainerPort

28. Plaintiffs were not unemployed between the time that their employment with XTRA ended on December 31, 1999 and their employment with ContainerPort began on January 1, 2000.

29. Plaintiffs have a different direct supervisor and different company rules, policies and procedures at their new employer, ContainerPort, compared to their former employer, XTRA.

30. At the Fairmont City facility, XTRA did very little work on containers (the steel box on top of the chassis). Presently, the volume of work on containers at the Fairmont City facility has increased.

31. The workers at the Chicago facility are now working on equipment that they had not worked on before while employed with XTRA.

32. ContainerPort has issued an employee handbook to Plaintiffs, which sets forth Plaintiffs' benefits with ContainerPort. XTRA Exhibit K and Plaintiffs' Exhibit L are copies of the ContainerPort Handbook.

33. The health insurer for ContainerPort is different than the health insurer for XTRA.

34. Plaintiffs no longer received coverage for eye examinations and eyeglasses/contact lenses.

35. Plaintiffs received two personal days per year at XTRA and receive one personal day per year at ContainerPort.

36. ContainerPort gives its employees a half day off for Good Friday and Christmas Eve while XTRA gives its employees the entire day off on those days. ContainerPort gives its employees a half day off for New Year's Eve whereas XTRA does not give its employees any time off for that day.

37. Plaintiffs will not become vested in ContainerPort's 401(k) plan with respect to ContainerPort's contributions on their behalf to that plan until they have been with ContainerPort for five years. Plaintiffs are always vested with respect to their own contributions to ContainerPOrt's 401(k) plan.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KELLY BRINES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 00-495-GPM
	)	
XTRA CORPORATION,	)	
	)	
Defendant.	)	

MOTION TO DISMISS

BE IT REMEMBERED AND CERTIFIED that heretofore on ***9/25/00***, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, ***HONORABLE G. PATRICK MURPHY,*** United States District Judge presiding, the following proceedings were recorded by mechanical stenography, transcript produced by computer.

APPEARANCES:

FOR PLAINTIFF: Attorney at Law, **Michael Brunton**, 100 East Clay Street, Suite 201, Collinsville, Illinois 62234

FOR DEFENDANT: THOMPSON COBURN, **BY: Allen Allred,** 525 West Main St., P.O. Box 750, Belleville, Illinois 62220-0750 and THOMPSON COBURN, **BY: Jeffrey Fink**, One Firstar Plaza, Suite 3500, St. Louis, Missouri 63101-9702

REPORTED BY: ***Molly N. Clayton, RPR,*** Official Court Reporter for United States District Court, Southern District of Illinois, 750 Missouri Ave., East St. Louis, Illinois 62201, (618) 482-9226

COURTROOM DEPUTY: *Kelly Brines, et al. v. XTRA Corporation*, Case Number 00-495-GPM, is called for hearing on the motion to dismiss. Will the parties identify themselves for the record.

MR. BRUNTON: Mike Brunton representing Mr. Brines.

MR. ALLRED: Allen Allred with Thompson Coburn representing XTRA Corporation.

MR. FINK: Jeffrey Fink also representing the defendant XTRA.

THE COURT: Mr. Fink, this matter is before the court this morning on various—well, Rule 12 motions to dismiss the complaint. The complaint is before the court on federal removal jurisdiction. Count 4 of the complaint alleges an ERISA claim. So the propriety of the removal has not been challenged. And I'll give the parties some insight into what I'm thinking. I don't think there is any question that counts 1, 2, and 3 were preempted. ERISA is one of the few, probably one of the two area, where the doctrine of complete preemption applies. And that is, once it's an ERISA claim the field is completely preempted and that's the case whether you call it an ERISA claim or not, it is. Complete preemption. Now if Mr. Brunton wants to argue that point I'll give him an opportunity, but having made a claim under ERISA I see no way that the state claims can stand.

Now we also have the motion to dismiss count 4 and the

nobody was terminated and there was no reduction in force that would have triggered a responsibility or an obligation to provider severance.

In this case it cites it right here on page 3 of the copy that your clerk provided this morning, your Honor. It says at page 3 in paragraph 6, "salaried employees terminated other than for cause or voluntary separation, due to the exigencies of the business situation, will be entitled to [separation] benefits."

In the case before the court our people – our client could have terminated these people with or without cause. In this case whether you had cause or not if you were terminated you were entitled to severance package. And it says at the bottom of page 3, your Honor, "In making these arguments, Eagle-Picher tacitly admits that nothing in the express language of the plan requires anything other than termination in order to trigger eligibility for separation benefits."

We say, in this case, Judge, that's not the case. We don't admit it. In fact it is just the opposite.

THE COURT: They didn't admit it was there. They said it is a tacit admission. Mr. Brunton, first of all, what do you say about counts 1, 2, and 3?

MR. BRUNTON: Well, first of all, they're denying that this is an ERISA action.

THE COURT: Wait a minute. Are you denying this is an

ERISA action?

MR. ALLRED: Judge, we're saying--

THE COURT: If it is the case goes right back to state court. You removed it and said this is a federal question case.

MR. ALLRED: We think, Judge, that *Pegram* case is on point. He alleges--

THE COURT: Stop. Is this an ERISA case or not?

MR. ALLRED: We think that it is an open question whether it's actually subject to ERISA. He's alleged it, as you said, in count 4. We think under *Pegram* case that's the basis to remove it, that he's alleged that and we did what we think was appropriate under the rules of removal.

THE COURT: All right. But that has everything to do with whether or not I dismiss counts 1, 2, and 3. If it's-- if these are state claims and they're viable then I can't dismiss them. But you're saying, as I understand your motion, these are completely preempted by ERISA?

MR. ALLRED: We think they are, Judge.

THE COURT: Now we got to the bottom of that. And I agree. I don't know how in the world you could construe this not to be an ERISA claim. I mean, it just-- I don't know how you could get there.

MR. BRUNTON: The point is, I guess-- and I will concede that if this is, in fact, an ERISA claim that there

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3977

KELLY BRINES, on behalf of herself
and all others similarly situated,

Plaintiff-Appellant,

v.

XTRA CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 00 C 495—G. Patrick Murphy, *Chief Judge.*

ARGUED MAY 24, 2002—DECIDED SEPTEMBER 10, 2002

Before POSNER, MANION, and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Circuit Judge.* This is a class action under ERISA on behalf of 55 employees terminated when their employer, XTRA, transferred the part of its business in which they worked to ContainerPort. They claim that XTRA's welfare benefits plan entitled them to severance pay even though they were offered the same employment by ContainerPort without a break on essentially the same terms. The district judge granted summary judgment for XTRA.

XTRA's 1992 plan promised severance pay in a specific amount "if the Company determines that there should be a reduction in the workforce for business reasons." The following year's plan, the one applicable to the members of the plaintiff class, replaced the severance provision in the previous plan with the following: "The company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force." ContainerPort hired all 55 class members at the same wages, plus 3 percent, that they had received from XTRA, with a benefits package similar though not identical, and in relatively minor respects less generous, than what they had had at XTRA.

They argue that they were the victims of a reduction in force, but that is a term used to describe a mass layoff, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 494 (7th Cir. 2000); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195, 1197 (7th Cir. 1997); *Tiltti v. Weise*, 155 F.3d 596, 601 (2d Cir. 1998), rather than the sale of a whole or the part of a business. *Allen v. Adage, Inc.*, 967 F.2d 695, 700 (1st Cir. 1992). The curious logic of their argument is that had XTRA merely transferred the part of the business they worked in to a wholly owned subsidiary of which they then became employees, they would be entitled to severance benefits because they had been terminated by XTRA. But the problem with the suit goes deeper. The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise. The statement in the plan that "The company will develop and implement an appropriate separation program" did not create a legally enforceable promise. Its vagueness alone would make it impossible for a court to provide any relief to the members of the class, who are seeking after all cash rather than the establishment of a program left to the employer's discretion to establish

and define at some undetermined future time. What is an "appropriate" separation program? The possibilities are endless. And by when was the company required to develop the program and put it into effect?

A court will not enforce a contract that is so vague that the court rather than the parties would have to formulate essential terms. *Goldstick v. ICM Realty*, 788 F.2d 456, 461 (7th Cir. 1986); *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 627-28 (5th Cir. 1985); *Brookhaven Housing Coalition v. Solomon*, 583 F.2d 584, 593 (2d Cir. 1978). And the vagueness of the "will develop" statement is a strong indication that it was not *intended* to be a promise, *Western Industries, Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198, 1205 (7th Cir. 1984); *Neeley v. Bankers Trust Co.*, *supra*, 757 F.2d at 627, but merely a prediction, which creates no rights. *Rexnord Corp. v. DeWolff Boberg & Associates, Inc.*, 286 F.3d 1001, 1005-06 (7th Cir. 2002).

The cases say that an ERISA plan need not be in writing in order to be enforceable. *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 811-12 (7th Cir. 1994); *Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (en banc); *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994). It just has to exist, in the sense that its essential terms are ascertainable (so that it doesn't flunk on vagueness grounds) and that it "was intended to be in effect, and not just be something for future adoption." *James v. National Business Systems, Inc.*, 924 F.2d 718, 720 (7th Cir. 1991). The statute requires plans to be in writing, 29 U.S.C. § 1102(a)(1); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995), but the courts reason that a failure to comply with that requirement should not redound to the company's benefit. *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 (5th Cir. 1990); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551

(6th Cir. 1989); *Donovan v. Dillingham, supra*, 688 F.2d at 1372. And while oral modifications of ERISA plans are not permitted, *Downs v. World Color Press*, 214 F.3d 802, 805 (7th Cir. 2000); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986), employers often have different plans covering different benefits, and it is conceivable that some might be written and some oral, with the oral enforceable so long as they did not (as in *Anderson v. Resolution Trust Corp.*, 66 F.3d 956, 959-60 (8th Cir. 1995)) contradict the written plan.

What we have been calling an "oral" plan is better termed an "informal" plan, the term used in such cases as *Deboard v. Sunshine Mining and Refining Co.*, 208 F.3d 1228, 1238-39 (10th Cir. 2000); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (en banc), and *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 400-01 (3d Cir. 1992). For it will usually be pieced out from documents (though oral testimony may be necessary to interpret them as constituting a plan), just not set forth in a nicely wrapped package labeled "employee welfare benefits plan." And so "written plan" (in the "written"-"oral" antithesis) is better termed "express" or "formal" plan. Even so, if the informal plan, though entirely written, modifies an existing plan, the modification is an amendment and to be valid must comply with any procedural requirements for a valid amendment that are set forth in the formal plan, *Downs v. World Color Press, supra*, 214 F.3d at 805; *Brewer v. Protexall, Inc.*, 50 F.3d 453, 456-57 (7th Cir. 1995); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992)—the plan's counterpart to Article VI of the U.S. Constitution.

There is a fair bit of judicial skepticism about "informal plans"—specifically whether by allowing their concoction by imaginative counsel in litigation employers will actually

be deterred from offering certain types of benefit. See, e.g., *Sprague v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998) (en banc); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). Perhaps it would be better to describe informal plans as simple contracts, enforceable under state law rather than under ERISA, a distinction suggested in two of our prior cases. *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955, 957-58 (7th Cir. 1998); *Sandstrom v. Cultor Food Science, Inc.*, 214 F.3d 795, 797-98 (7th Cir. 2000); cf. *Massachusetts v. Morash*, 490 U.S. 107, 118-19 (1989). We need not pursue the matter further. Even if it is open to the plaintiff to argue that XTRA replaced its discontinued severance plan with an informal one, see *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, supra*, 974 F.2d at 400-01; *Elmore v. Cone Mills Corp., supra*, 23 F.3d at 861, his effort to show this falls short.

XTRA's statement in the 1993 plan of its intention to create a program of severance benefits could not be the informal plan that replaced the severance provision in the 1992 plan, for the reasons that we've explained. But the plaintiff points out that on a number of occasions after 1992 the company paid severance benefits to discharged workers in accordance with the formula in the 1992 plan, and he argues that this "ongoing practice and procedure to pay [severance] benefits in the past, pursuant to XTRA's standard formula," constituted a successor plan. The year before the transfer to ContainerPort, XTRA had discussed a possible merger with another company (Apollo) and had informed its employees that it would provide severance pay if they weren't offered a permanent comparable position in an affiliate of XTRA. And executives of XTRA acknowledged that they would have given the members of the plaintiff's class severance pay had they not been offered comparable jobs

by ContainerPort. (The plaintiff argues that they were not really comparable, but we need not decide that.) XTRA did give severance pay—calculated by the standard formula—to the one employee to whom ContainerPort did not offer a job.

The company's statements were not, as the plaintiff claims, "admissions" that "there was a severance benefit plan." They were merely descriptions of an acknowledged practice. Practices do sometimes have legal significance, however. A practice can be the basis for inferring a policy that can make a municipality liable for a constitutional tort under the regime of the *Monell* decision, *Cornfield by Lewis v. Consolidated High School District No. 230*, 991 F.2d 1316, 1326 (7th Cir. 1993), or for inferring that the user of another person's land has become a licensee. *Wytupeck v. Camden*, 136 A.2d 887, 894-95 (N.J. 1958). A little closer to home, a practice, under the rubric "course of dealing," can be evidence of what a contract requires. See, e.g., UCC § 1-205; *Restatement (Second) of Contracts* § 223 (1981); *Frank Novak & Sons, Inc. v. Sommer & Maca Industries, Inc.*, 538 N.E.2d 700, 703-05 (Ill. App. 1989). But the plaintiff in this case wants to use the employer's practice of paying severance pay not to explicate a contract but to create one; and a practice does not create an obligation under the principles of contract law (the principles normally and here applicable to teasing out the obligations created by a pension or welfare plan governed by ERISA) unless it creates a contract "implied in fact."

A contract implied in fact is one in which behavior takes the place of articulate acceptance, as in *Hobbs v. Massasoit Whip Co.*, 33 N.E. 495 (Mass. 1893) (Holmes, J.), a suit

> for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants de-

> clined to accept the skins. . . . The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. . . . [It] was fair to assume that if [the defendant] had admitted the eel skins to be over 22 inches in length, and fit for its business, . . . it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party.

See also *A.E.I. Music Network, Inc. v. Business Computers, Inc.*, 290 F.3d 952, 956-57 (7th Cir. 2002); *Dallis v. Don Cunningham & Associates*, 11 F.3d 713, 715-16 (7th Cir. 1993). The plaintiff in Holmes's case had by reason of his previous dealings with the defendant good reason to believe that the defendant would not destroy the eel skins; indeed, the plaintiff would not have sent them to the defendant had he thought there was such a risk. The plaintiff in the present case, a supplier of labor albeit not of eels, did not "offer" to work in exchange for a promise of severance pay, and the defendant did not "accept" the "offer" by

paying severance pay to other employees. The absence of an offer makes it impossible to construe the mute practice as acceptance. The normal understanding of severance pay (when not provided for in a written plan), as of bonuses, is that it is at the discretion of the employer; there is nothing here to upset that understanding.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit